No. 86-824

In the Supreme Court of the United States

OCTOBER TERM, 1986

ADOLPHUS MORRIS
SPECIALIST FOUR, UNITED STATES ARMY,
PETITIONER,

v.

THE UNITED STATES OF AMERICA,
RESPONDENT.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF MILITARY APPEALS

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QUESTION PRESENTED

WHETHER the doctrine of separation of powers was violated when the court below flagrantly disregarded the intent of Congress and without authority *de facto* "amended" the military felony-murder rule of Article 118(4) of the Uniform Code of Military Justice to encompass one who participates in the commission of the felony but not the murder.

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PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF MILITARY APPEALS

The petitioner, Adolphus Morris, respectfully prays that a writ of certiorari issue to review the judgment and opinion of the United States Court of Military Appeals entered in this proceeding.

OPINIONS BELOW

The opinion of the Court of Military Appeals is reported at 22 M.J. ____ (C.M.A. 1986) (Appendix A). The opinion of the Army Court of Military Review is unpublished, CM 444740 (A.C.M.R. 31 Oct. 1984) (Appendix B).

JURISDICTION

The judgment of the Court of Military Appeals was entered on September 26, 1986, affirming petitioner's conviction dated 2 August 1983. The jurisdiction of this court is invoked under 28 U.S.C. § 1259(3) (Supp. II 1984).

STATUTORY PROVISIONS INVOLVED

The Uniform Code of Military Justice, 10 U.S.C. § 801 *et seq.* (1984), provides:

> Article 77, Principals: "Any person punishable under this chapter who–(1) commits an offense punishable by this chapter, or aids, abets, counsels, commands, or procures its commission; or (2) causes an act to be done which if directly performed by him would be punishable by this chapter; is a principal."
>
> Article 118, Murder: "Any person subject to this chapter who, without justification or excuse, unlawfully kills a human being, when he–
>
> (1) has a premeditated design to kill;
> (2) intends to kill or inflict great bodily harm;
> (3) is engaged in an act which is inherently dangerous to others and evinces a wanton disregard of human life; or
> (4) is engaged in the perpetration or attempted perpetration of burglary, sodomy, rape, robbery, or aggravated arson;
>
> is guilty of murder and shall suffer such punishment as a court-martial may direct, except that if found guilty under clause (1) or (4), he shall suffer death or imprisonment for life as a court-martial may direct."

STATEMENT OF THE CASE

On the night of 6-7 May 1983, a German taxicab driver, Ernst Walla, was shot to death by Specialist Four (SP4) Anthony Marable during a robbery. The petitioner was involved in the commission of the armed robbery because he agreed to drive his co-accuseds[1] to and from the scene of the crime. He did not enter the cab or participate in the actual killing that took place therein. He was convicted of murder

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[1] Private First Class Dwayne K. Jefferson was in the cab when the driver was shot by SP4 Marable and both were charged with murder along with petitioner. The court below erroneously states in its opinion that petitioner admitted his involvement in the robbery at Private Jefferson's court-martial. Petitioner did not testify at Private Jefferson's court-martial.

and sentenced to a dishonorable discharge, confinement for life, partial forfeitures of pay, and reduction to the lowest enlisted grade. Pursuant to a pretrial agreement the convening authority reduced the period of confinement to twenty years,[2] but otherwise approved the sentence. The Army Court of Military Review affirmed the findings and sentence as did the United States Court of Military Appeals.

The issue litigated and considered by the Court of Military Appeals, as a prerequisite to this Court's jurisdiction was:

> WHETHER THE PROVIDENCE INQUIRY WAS INADEQUATE TO PERMIT THE APPELLANT TO INTELLIGENTLY PLEAD TO THE CHARGE AND ITS SPECIFICATION.

REASONS FOR GRANTING THE WRIT

The issue in this case is one of federal statutory interpretation: whether Congress intended to include one who does not actually kill the victim under the military felony murder provision. When the Court of Military Appeals interpreted the relevant provision and ruled that an accused who participates in the felony but not in the killing is encompassed within the ambit of the military felony murder rule, it adopted a broad construction that the lower court itself conceded was "hard to square with the maxim that penal statutes are to be construed narrowly." *United States v. Jefferson*, 22 M.J. 315, 325 (C.M.A. 1986). Such a broad construction constitutes an unwarranted extension of congressional intent. The court below has gone beyond its judicial scope of review and usurped congressional power and amended what it believed to be inartfully drafted legislation.[3] Action by this Court is necessary to conform the application of the statute to its stated parameters.

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[2] Although petitioner's confinement was substantially reduced in exchange for his offer to plead guilty, it still well exceeded the maximum confinement imposable for robbery of 15 years. Article 121, Uniform Code of Military Justice, 10 U.S.C. § 921 (1982).

[3] *See* Metropolitan Life Ins. Co., v. Ward, 105 S.Ct. 1676, 1694 (1985) (O'Connor J., dissenting) (" '[T]he judiciary may not sit as a

I. THE MILITARY FELONY MURDER RULE IS UNAMBIGUOUS ON ITS FACE AND DOES NOT ENCOMPASS ONE WHO DOES NOT KILL.

Under the common law definition of felony-murder, "one whose conduct brought about an unintended death in the commission or attempted commission of a felony was guilty of murder." *Black's Law Dictionary* (5th ed. 1979). When Congress enacted a felony murder rule for the military, however, the language it chose to assign culpability for felony murder was that "[a]ny person . . . who . . . kills a human being, when he is . . . engaged in the perpetration or attempted perpetration of burglary, sodomy, rape, robbery, or aggravated arson . . . is guilty of murder . . . ." Article 118(4), Uniform Code of Military Justice [hereinafter cited as UCMJ], 10 U.S.C. § 918(4)(1982). Congress thus clearly intended to limit the military felony-murder rule. First, it applies only to five enumerated felonies rather than, traditionally, all felonies. And second, Congress limited the application of the rule to the person who kills, *i.e.*, the actual perpetrator of the killing.

The principles of statutory construction are long-established. The first rule requires one to look to the language of the statute. *Caminetti v. United States*, 242 U.S. 470 (1971). "The intention of the legislature is to be collected from the words they employ. Where there is no ambiguity in the words, there is no room for construction." *United States v. Wiltberger*, 18 U.S. (5 Wheat.) 76, 95-96 (1820) *see also American Tobacco Co. v. Patterson*, 456 U.S. 63, 68 (1982). If the language of the statute is clear, "the sole function of the courts is to enforce it according to its terms." *Caminetti v. United States*, 242 U.S. at 485. Absent a contrary indication, a court "must assume that the framers of these statutory provisions intended to convey the ordinary meaning which is attached to the language they used." *Jones v. Liberty Glass Co.*,

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superlegislature. . . .' ") (*Quoting* New Orleans v. Dukes, 427 U.S. 297, 303 (1976)); Roe v. Wade, 410 U.S. 113, 173 (1973) (Rehnquist, J., dissenting) (A court should not substitute its opinion for that of legislative judgment).

332 U.S. 524, 531 (1974). *See Sutherland Statutory Construction* (Sands 4th ed. 1974) [hereinafter cited as Sutherland], chapter 46.

The language of Article 118(4), UCMJ, is unambiguous: only the actual perpetrator of the killing falls within the ambit of the felony murder rule. The Court of Military Appeals, notwithstanding Congress' unambiguous language, reached beyond the language of Article 118(4) and "clarified" it by drawing on Article 77 of the UCMJ, which makes a principal of one who "causes an act to be done which if directly performed by him would be punishable." The lower court then ruled that Article 118(4), as modified, encompasses one who participated in the felony but not in the murder. *United States v. Jefferson*, 22 M.J. at 325. Such an interpretation can be reached only by ignoring a long history of well-established rules of statutory construction. Congress' language in Article 118(4) is clear: it was the duty of the lower court to apply that language literally and not reach for an alternative construction which, under the rubric of "clarification," actually modifies or amends this statute.

The Court has made it clear that judicial interpretation of a statute is only allowed when an ambiguity exists in the wording of the statute. "There is no ambiguity in the act, nor is it requisite to extend the words of it beyond their plain meaning in order to arrive at the intention of the legislature." *Smith v. Stevens*, 77 U.S. (10 Wall.) 321, 326 (1870). *See also Packard Motor Co. v. NLRB*, 330 U.S. 485, 492 (1947).

> It is not for [the court] then to try to avoid the conclusion that Congress did not mean what it said. Arguments of policy are relevant when for example a statute has a hiatus that must be filled or there are ambiguities in the legislative language that must be resolved. But when Congress, though perhaps mistakenly or inadvertently, has used language which plainly brings a subject matter into a statute, its word is final – save for questions of constitutional power which have not even been intimated here.

Unexcelled Chemical Corp. v. United States, 345 U.S. 59, 64 (1953). The language of Article 118 is unambiguous; only an individual who kills is subject to its strictures. The facts clearly show that petitioner did not kill Ernest Walla.

II. A NARROW CONSTRUCTION OF THE MILITARY FELONY MURDER STATUTE PRECLUDES APPLICATION OF THE RULE TO ONE WHO DOES NOT KILL.

Any doubt concerning the intended scope of a penal statute must be resolved by a strict construction in favor of the individual. *Sutherland*, § 58.04. While "not an inexorable command to override common sense and evident statutory purpose," *United States v. Brown*, 333 U.S. 18, 25 (1948), courts must be mindful of the canon that penal statutes are to be strictly construed.

The Court of Military Appeals recognized that it was violating that canon when it applied a broad construction. *United States v. Jefferson*, 22 M.J. at 325. The primary support for the lower court's expansive interpretation of the legislative history of Article 118 was a committee discussion which indicated that "some members of Congress wished to impose vicarious liability for a killing committed by a co-felon . . . ." *United States v. Jefferson*, 22 M.J. at 322, *citing Hearings on H.R. 2498 Before House Armed Services Committee*, 81st Cong., 1st Sess. 1240-44 (1949). Yet even the lower court recognized that this discussion was of "diminished" significance since, although the question was raised in the committee, no provision was made for vicarious liability for felony murder in Article 118(4)[4]. *United States v. Jefferson*, 22 M.J. at 322 n.10. Congress' failure to clarify the issue of

[4] The relevant legislative history indicates that during committee discussion of Article 118, UCMJ, Representative Elston brought up the point that he believed that the subject Article did not clearly state that individuals who did not kill but participated in a felonious act that resulted in a death would fall under the military felony murder rule. The commitee recessed for lunch before Mr. Elston's question could be resolved and then failed to address the question anytime thereafter. Hearings on H.R. 2498 Before House Armed Services Committee, 81st Cong., 1st Sess. 1240-44 (1949).

vicarious liability after notice that the issue existed cannot be taken "as importing clear direction to the courts to do what Congress itself either refused or failed on notice to do . . . ." *United States v. Evans*, 333 U.S. 483, 492 (1948).

Further, not only was the question raised but Congress has shown elsewhere that if it wishes to establish vicarious liability, it is fully capable of expressing that intention in unambiguous language. Thus, the civilian federal felony murder rule is defined not in terms of who committed the act, but by the circumstances under which the act was committed. *See* 18 U.S.C. § 1111 (1984) (murder in the first degree includes a killing "committed in the perpetration of, or attempt to perpetrate, any arson, rape, burglary or robbery . . ."). "The plain words and meaning of a statute cannot be overcome by a legislative history which, through strained processes of deduction from events of wholly ambiguous significance, may furnish dubious basis for inference in every direction." *Gemsco, Inc. v. Walling*, 324 U.S. 244, 260 (1945).

Although the Court of Military Appeals partially grounded its decision on the common law rule, *United States v. Jefferson*, 22 M.J. at 325 (one is guilty of felony murder if his conduct results in a death during the commission of a felony), Congress clearly abrogated the common-law rule of felony murder when it enacted Article 118(4). Indeed, the fact that Congress did not include vicarious liability in Article 118(4), especially in the face of the common law rule to the contrary, evidences that it intended to exclude those who did not actually do the killing. *Expressio unius est exclusio alterius. See Sutherland, supra* at § 47.23 (footnote omitted).

Both the literal terms of Article 118(4) and a proper application of the rules of statutory construction dictate that Article 118(4) be limited to the actual perpetrator of the killing. Had Congress wished to establish vicarious liability, it had only to unambiguously so declare. "But when [a] choice has to be made between two readings of what conduct Congress has made a crime, it is appropriate, before we choose the harsher alternative, to require that Congress should have spoken in language that is clear and definite. We should not

derive criminal outlawry from some ambiguous implication." *United States v. Universal Corp.*, 344 U.S. 218, 221-222 1952). In extending the reach of Article 118(4), the lower court exceeded the prerogative of the judicial arm and intruded upon the territory of the legislative arm. "Statutes creating and defining crimes are not to be extended by intendment because the court thinks the legislature should have made them more comprehensive." *United States v. Weitzel*, 246 U.S. 533, 543 (1918), *citing Todd v. United States*, 158 U.S. 278, 282 (1895) and *United States v. Harris*, 177 U.S. 305, 310 (1900).

III. THE PETITIONER WAS PREJUDICED BY THE DECISION BELOW.

The petitioner did not kill Ernst Walla. He was not in the taxicab where the murder took place. He did not even know that his co-actors were armed. Petitioner is obviously prejudiced by his conviction for murder, and the mandatory life sentence which followed, if the expansive application of Article 118(4) by the Court of Military Appeals does not comport with its plain language or the intent of Congress.

CONCLUSION

This case presents a fundamental issue on the intended application of a federal statute. The lower court, in the face of Congress' unambiguous language and contrary to well-established rules of statutory construction, exceeded its judicial powers and seized the legislative prerogative to create a category of offender not otherwise included. For this reason the petition for certiorari should be granted.

Respectfully submitted,

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APPENDICIES

APPENDIX A

UNITED STATES COURT OF
MILITARY APPEALS

USCMA Dkt. No. 51447/AR
CMR Dkt. No. 444740

UNITED STATES, APPELLEE

v.

ADOLPHUS M. MORRIS (257-17-8943), APPELLANT

MEMORANDUM OPINION AND ORDER

This case is a companion to *United States v. Jefferson*, 22 M.J. 315 (C.M.A. 1986). Morris was charged with the murder of Ernest A. Walla in the perpetration of robbery, in violation of Article 118, Uniform Code of Military Justice, 10 U.S.C. § 918. After the charge was referred to a general court-martial, he elected trial by judge alone and pleaded guilty pursuant to a pretrial agreement, which required him to testify against Jefferson. Pursuant to his pleas, he was found guilty, and sentenced to dishonorable discharge, confinement for life, forfeiture of $500.00 pay month for 18 months, and reduction to the grade of E-1. As required by the pretrial agreement, the convening authority reduced the confinement to 20 years; but otherwise he approved the findings and sentence. The United States Army Court of Military Review affirmed; and we granted review on this issue:

> WHETHER THE PROVIDENCE INQUIRY WAS INADEQUATE TO PERMIT THE APPELLANT TO INTELLIGENTLY PLEAD TO THE CHARGE AND ITS SPECIFICATION.

According to a stipulation of fact which was received in evidence at his trial and conformed with his testimony at Jefferson's trial, Morris had agreed with Jefferson and Marable

to rob a cab driver. Appellant was to drive a getaway car. His answers during the providence inquiry revealed that he had no intentions that anybody be killed and did not even realize that Jefferson and Marable were armed. Nonetheless, according to our construction of Article 118, appellant can be convicted of felony murder. *Cf. United States v. Jefferson, supra.* His answers to the providence inquiry left no doubt that he aided and abetted the robbery and that the homicide occurred in the perpetration of the robbery. Therefore, even if he had no intent to kill the victim or do him bodily harm, appellant was guilty as charged. The providence inquiry was quite adequate in light of the interpretation of Article 118 adopted by this Court in *United States v. Jefferson, supra.*

Accordingly, it is by the Court, this 26th day of September, 1986,

ORDERED:

That the decision of the United States Army Court of Military Review is affirmed.

For the Court,*

/s/ JOHN A. CUTTS, III

John A. Cutts, III
Deputy Clerk of the Court

cc: The Judge Advocate General of the Army
Appellate Defense Counsel (HANCOCK)
Appellate Government Counsel (HOADLEY)

* Judge SULLIVAN did not participate.

APPENDIX B

UNITED STATES ARMY COURT OF
MILITARY REVIEW

CM 444740

UNITED STATES, APPELLEE

v.

SPECIALIST FOUR ADOLPHUS M. MORRIS, SSN 257-17-8943,
UNITED STATES ARMY, APPELLANT

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31 Oct. 1984

Lieutenant Colonel Paul J. Luedtke, JAGC, Lieutenant Colonel William P. Heaston, JAGC, and Lester Lichter, Esquire, were on the pleadings for appellant.

Colonel James Kucera, JAGC, Lieutenant Colonel Adrian J. Gravelle, JAGC, and Lieutenant Colonel Thomas M. Curtis, JAGC, were on the pleadings for appellee.

Before MARDEN, PAULEY, and WERNER, Appellate Military Judges

MEMORANDUM OPINION

Per Curiam:

Pursuant to his plea, appellant was found guilty of felony murder and sentenced to a dishonorable discharge, confinement at hard labor for life, forfeiture of $500.00 pay per month for eighteen months, and reduction to Private E-1. Pursuant to a pretrial agreement the convening authority lowered the confinement portion of the sentence to twenty years confinement and approved that as well as the balance of the sentence.

Appellant challenges the constitutionality of the mandatory life sentence for this offense prescribed by paragraph 126(a), Manual for Courts-Martial, United States, 1969 (Revised edition)[1] as a violation of due process – violation of the constitutional doctrine of separation of powers, and as cruel and unusual punishment in violation of the Eight Amendment to the Constitution. We decline to so hold. *See United States v. Teeter*, 16 M.J. 68 (CMA 1983).

Appellant further challenges the adequacy of the military judge's plea inquiry and attacks the adequacy of his counsel. We find the plea inquiry to be thorough and it adequately established that the appellant's plea was provident and properly accepted. Further, we find appellant's attack on his trial defense counsel to be baseless and his allegations totally refuted by his responses of record to the military judge and the affidavits of appellant's trial defense counsel. *See United States v. Zuis*, 49 C.M.R. 150 (ACMR 1974).

Accordingly, the findings of guilty and the sentence are affirmed.[2]

FOR THE COURT:

/s/ WILLIAM S. FULTON, JR.

William S. Fulton, Jr.
Clerk of Court

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[1] Paragraph 126(a) merely reflects the requirement of Article 118, Uniform Code of Military Justice.

[2] We note appellant has personnally raised both the constitutionality issue and has challenged the adequacy of his counsel. United States v. Grostefon, 12 M.J. 431 (CMA 1982).

U.S. GOVERNMENT PRINTING OFFICE: 1986—168-052/42004